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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE SQUILLACOTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondents' opposition is based almost entirely on their argument, repeated throughout their brief (at 5, 7, 8, 10, 11, 12), that the question in this case does not concern "pure subject matter jurisdiction" (Br. in Opp. 12) and that the court of appeals' "*power* to hear [the] case" (*id.* at 7; emphasis in original) is not at issue. These propositions are demonstrably false. No court has ever distinguished between grades of subject matter jurisdiction, with some "pure" and others not. And this case most certainly does implicate the fundamental power of the court of appeals to hear it: respondents admit (*id.* at 3) that the court of appeals held that under 28 U.S.C. 1295 it did not have jurisdiction to hear the appeal. That the jurisdictional issue was not "timely raised" cannot serve to create subject matter jurisdiction where none exists.

a. Respondents advance the same proposition relied on by the court of appeals — that jurisdiction is only an absolute when federalism is at stake. They cite not a single case in support of this notion. The utter absence (until the decision below) of judicial acceptance of such a curious idea is not surprising, for this Court has consistently accorded "full" jurisdictional status to statutes, such as Sections 1252 and 1291 of Title 28, that simply regulate the business of the federal courts (see Pet. 18-19). Moreover, because federal courts are constitutionally of limited jurisdiction, the respective powers of the states and the federal government are at issue whenever jurisdiction is questioned, even on statutory grounds. See *Insurance Corp.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982).[1]

Respondents' attempt (Br. in Opp. 10-11) to convert Section 1295 into a venue provision is completely meritless. As we demonstrated in our petition (at 16-17), Congress plainly intended that Section 1295 operate as a jurisdictional statute, and it explicitly stated that the nonwaivability doctrine applies to its provisions. Respondents' reliance on *Panama R.R.* v. *Johnson*, 264 U.S. 375 (1924), is therefore misplaced.[2] In *Panama R.R.*, the Court gave effect to Congress's intent that a statute, though couched in jurisdictional language, provided only for venue and did not limit

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[1]Respondents argue (Br. in Opp. 8-9) that the willingness of courts to consider policy issues and legislative intent in interpreting jurisdictional statutes demonstrates that subject matter jurisdiction is flexible when federalism concerns are absent. This argument is plainly wrong. Of course courts may consider policy and legislative intent when they determine whether an ambiguous provision should be interpreted to vest jurisdiction in a particular court. But once that determination is made, the court cannot rely on generalized policy notions to retain a case it is not empowered to decide. Respondents cite no case looking to policy to disregard the nonwaivability doctrine.

[2]*Pure Oil Co.* v. *Suarez*, 384 U.S. 202 (1966), also relied on by respondents, simply notes and follows *Panama R.R.* (384 U.S. at 203).

the general grant of jurisdiction to the district courts in another statute. Here, by contrast, Congress's intent could not be plainer — its choice of the term "jurisdiction" in Section 1295 was deliberate and was intended to carry with it the full measure of absoluteness heretofore universally accorded limitations on subject matter jurisdiction.

Moreover, if Section 1295 is a venue statute, then there is no statute conferring actual jurisdiction over appeals from final judgments in the Federal Circuit, for Section 1291 explicitly exempts that court from its provisions. As the Court recently stated in *Lindahl* v. *OPM*, No. 83-5954 (Mar. 20, 1985), slip op. 23 n.30, "[v]enue provisions come into play only after jurisdiction has been established." Without an antecedent grant of jurisdiction, Section 1295 cannot possibly be viewed as relating to venue. It must be addressed to jurisdiction, *i.e.*, to the court's " 'power to adjudicate' " the controversy before it (*Lindahl*, slip op. 23).[3]

b. The failure of the parties to note the jurisdictional defect earlier in this proceeding does not and cannot constitute a waiver of the issue. That, indeed, is the meaning of the doctrine that the question of subject matter jurisdiction is always open. See, *e.g.*, Fed. R. Civ. P. 12(h)(3). The duty to inquire into jurisdiction rested here, as always, as much with the court of appeals as it did with the parties. As the court stated in *Potomac Passengers Ass'n* v. *Chesapeake & O. Ry.*, 520 F.2d 91, 95 n.22 (D.C. Cir. 1975) (citations omitted; emphasis added):

> It is a commonplace of federal procedural law that a court, whether trial or appellate, has a duty to notice a

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[3]In *Lindahl*, the Court described the Federal Courts Improvement Act of 1982, which enacted Section 1295, as establishing a "jurisdictional framework" (slip op. 22); the Court nowhere suggested that Section 1295 was not a jurisdictional provision.

> failure of subject matter jurisdiction on its own motion at any time during the proceedings. That both parties to this suit, and the trial judge, proceeded on the assumption that the case was properly before the District Court does not alter our responsibility. Federal subject matter jurisdiction cannot be created by consent, waiver, or even estoppel. * * * *If a federal court is powerless to adjudicate a controversy, it is duty-bound to recognize that fact, however belated its realization.*

See also Pet. 17-18. In *Potomac Passengers Ass'n*, the court of appeals, while "regretful of the expenditures of time and energy which have gone into the * * * litigation," arrived at "the reluctant conclusion" that subject matter jurisdiction was not present, though the suit had been pending for several years and had already been before the court of appeals once earlier (520 F.2d at 95). The court of appeals in this case failed in its duty to hew to the limits imposed by Congress on its power to decide the case before it.

2. Unable to provide reasoned support for the court of appeals' decision, respondents contend that the case lacks significance. Respondents are incorrect. The decision below is important both with respect to the Federal Courts Improvement Act of 1982 and with respect to subject matter jurisdiction doctrine generally. As respondents recognize, the court of appeals' decision can be rationalized only on the erroneous ground that Congress did not mean what it said when it set forth the "exclusive jurisdiction" of the Federal Circuit in Section 1295. Such a precedent will be relevant in a variety of contexts — the jurisdiction of the Federal Circuit is complex and not always easily ascertained, hence a number of cases have been and will continue to be appealed in the first instance to the regional courts of appeals, though they belong properly only in the Federal

Circuit.[4] Should the regional courts of appeals follow the decision below, the Federal Circuit's jurisdiction will be improperly curtailed by the happenstance of when the jurisdictional defect is discovered.

Moreover, as we discussed in our petition (at 25), the court of appeals' ill-considered exception to the nonwaivability of jurisdictional defects (see Pet. App. 6a) has broad implications that would reach to virtually every jurisdictional provision. Transfer after argument and decision on the merits is usually inefficient, but that is the price paid for respect of the constitutional and statutory limitations on the power of the judiciary. The court of appeals' exception would swallow the rule — jurisdictional defects would always be waived after a decision on the merits.[5] Such an expansion of judicial power is unsupportable and should be corrected by this Court.

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[4]Respondents cite (Br. in Opp. 14-15) three cases in the regional courts of appeals that, they contend, should have been transferred to the Federal Circuit if our "theory is correct." However, not one of those cases addresses the waivability of jurisdictional defects under Section 1295; if respondents are correct that those cases were actually within the exclusive jurisdiction of the Federal Circuit, it only serves to demonstrate that Section 1295's provisions are not always obvious or capable of easy application, underscoring the importance of complying with its jurisdictional commands whenever they are discovered.

[5]The court of appeals' purported limitation to situations where the jurisdictional provision is ambiguous is nugatory, for the supposed ambiguity here is unrelated to whether the jurisdictional defect is waivable (see Pet. 15), and of course any jurisdictional statute can be found to contain some ambiguous language.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

REX E. LEE
Solicitor General

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